002-16

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

STUDENT M.M., by his parent,	:
Petitioner,	:
	:
vs.	:
	:
PAWTUCKET SCHOOL	:
DEPARTMENT,	:
Respondent	:

DECISION

Held: Parent, whose son was permitted to transfer to a school in the district which was located further from the family residence, failed to prove that providing transportation to the new school was a medical necessity or otherwise required under applicable law, and thus the school department was not required to make an exception to its general practice of conditioning approval of such inter-district transfers upon a waiver of the right to transportation.

January 14, 2016

I. Jurisdiction, Standard of Review, and Burden of Proof

Petitioner, STUDENT M.M., by his parent/mother (the "Petitioner" or the "Student"), filed a petition with the Commissioner on or about November 13, 2015 appealing the decision of Respondent, PAWTUCKET SCHOOL DEPARTMENT (the "Respondent" or "Pawtucket"), to refuse his request for transportation to Joseph Jenks Junior High School ("Jenks") in Pawtucket, where he attends the sixth (6^{th}) grade.

The Commissioner has jurisdiction over the dispute under RIGL § 16-39-1, and such disputes are heard *de novo*.[1] The burden of proof is on the petitioner to prove his or her case by a preponderance of the evidence.[2]

II. Undisputed Facts and Documentary Evidence

An evidentiary hearing was conducted on December 29, 2015 before the undersigned and the following facts were undisputed:

1. At all relevant times the Student lived with his family at 426 West Avenue in Pawtucket, and under normal circumstances, would have attended Samuel Slater Junior High School ("Slater") in Pawtucket.

2. At some time prior to or during 2010, the Student experienced left-sided stiffness and hip pain and was diagnosed with dystonia,[3] as evidenced by the medical records introduced by the Student, which date from December 15, 2010 through September 28, 2015. *See* Petitioner's Exhibits 1 through 6.[4]

3. On February 6, 2012, Pawtucket's physician, John Gaitanis, M.D., opined that the Student was "able to be transitioned to a regular [physical education] class," *see*

[1] RIGL § 16-39-1 confers jurisdiction upon the Commissioner with respect to "any matter of dispute . . .arising under any law relating to schools or education." *Id*. As to the applicable standard of review, *see* cases cited in *Y.S. as parent and next friend of Student F. Doe v. William M. Davies Career and Technical High School*, RIDE No. 017-14 at 2 (November 3, 2014).

[2] *See, e.g., Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases); *see* also 2 Richard Pierce, *Administrative Law Treatise*, § 10.7 at 759 (2002).

[3] According to a well-known medical dictionary, "dystonia" involves "prolonged muscular contractions that may cause twisting (torsion) of body parts, repetitive movements, and increased muscular tone." *See Taber's Cyclopedic Medical Dictionary* at 629 (F.A. Davis Co., Ed. 19, 2001).

[4] Pawtucket counsel's objection to the introduction of the medical records, which was based solely on grounds of relevancy, was overruled. While the currency of the records arguably bore upon their persuasiveness, it did not preclude their admissibility under RIGL § 42-35-10.

Respondent's Exhibit 2, and according to his mother, he has been attending regular physical education classes since that time.

4. Pawtucket did not consider the Student to be a "child with a disability" under the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (the "IDEA"), and thus never developed an individualized education program (an "IEP") for the Student.[5] Pawtucket did implement a plan for the Student under Section 504 of the Rehabilitation Act of 1973 ("Section 504").[6] However, the Section 504 plan was discontinued in 2014.

5. On June 19, 2015, the Student's mother requested that he be permitted to transfer to Jenks, which is located further from his residence than Slater. *See* Respondent's Exhibit 1.

6. In the transfer request form signed by the Student's mother (the "Transfer Request"), she stated that the Student's older brother attended Jenks, and "in case of any emergency [the older brother] will be able to assist and take care of [the Student]." *Id*.

7. The Student's mother also expressly acknowledged in the Transfer Request that "no transportation will be provided." *Id*.

8. It is Pawtucket's practice to grant such inter-district transfer requests if possible provided that transportation is not included, and it did so in this case.

9. The Student is in the sixth (6^{th}) grade and has been attending Jenks since the beginning of the 2015-16 school year.

10. The Student's mother requested that Pawtucket provide transportation to Jenks soon after the beginning of the school year. Pawtucket denied the request pursuant to its practice of not providing transportation to students who elect to transfer to schools which are further from their residences, and alleged that its physician had concluded that attending Jenks (as opposed to Slater) was not medically necessary.

11. On September 28, 2015, one of the Student's physicians – Gita Harappanahally, M.D., of the Department of Neurology at Hasbro Children's Hospital in Providence – noted that:

[5]Under the IDEA, "a free, appropriate, public education [(a "FAPE")] must be available to all eligible children residing in the local educational agency [(the "LEA")] between the ages of 3 and 21." *See* Rhode Island Board of Education's Regulations Governing the Education of Children with Disabilities (the "Special Ed. Regs.") at § 300.101. Here, the Student did not claim that an IEP should have been developed, but if such an allegation had been made, it would have to have been adjudicated elsewhere by an impartial hearing officer who was not an employee of RIDE. *See* IDEA, 20 U.S.C.A. § 1415(b) (2); Special Ed. Regs. at § 300.511(c)(i)(A). In such cases, parents should contact RIDE's Office of Student, Community and Academic Supports and/or file a due process complaint under the IDEA.

[6] Like the IDEA, Section 504 requires LEAs to provide each qualified student with a FAPE. *See* 34 CFR §§ 104.33.

> [d]ue to his dystonia, [the Student] need[s] to be provided with a bus stop that is close to his home for his safety. He is at a high risk for stumbling and falling, his dystonia is worse when it is cold outside.

***See* Petitioner's Exhibit 6.**

12. Pawtucket does provide transportation to Slater at a bus stop close to the Student's home.

III. The Positions of the Parties

1. The Student's Position

The Student asserts that Pawtucket is legally required to provide him with transportation to Jenks based upon two separate arguments: first, that it is "medically necessary" that he attend Jenks rather than Slater; and second, that because of this medical necessity, Pawtucket is legally required to provide him with transportation to Jenks at a bus stop close to his home.

The first argument was supported solely by the inference in the conclusory testimony of the Student's mother that Jenks has fewer stairs than Slater. The second claim rested upon an inferred legal obligation, as well as the medical documents admitted into evidence, particularly the September 28, 2015 opinion of Dr. Harappanahally. *See* § II (11), *supra*, and Petitioner's Exhibit 6.

2. Pawtucket's Position

Pawtucket's denial of transportation to Jenks also was based upon two separate arguments: first, that the Student's mother had expressly agreed to abide by Pawtucket's practice of not providing transportation to students who elect to transfer to schools further from their residences when she signed the Transfer Request; and second, that its physician had concluded that, contrary to the claim of the Student's mother, attending Jenks (as opposed to Slater) was not medically necessary.

Pawtucket supported the first argument by citing to the plain language of the Transfer Request, *see* § II (7), *supra*, at 3 and Respondent's Exhibit 1. As to its second argument, Pawtucket relied upon the hearsay testimony of its Assistant Superintendent, Lee Rabbitt, who testified (without objection) that the District had been informed by its physician (Dr. Gaitanis) that in his opinion and in the opinion

of the Student's physician, it was not medically necessary that the Student attend Jenks.

IV. Discussion

As noted, local educational agencies like Pawtucket are required under the IDEA and Section 504 to provide a disabled student with a FAPE. *See* notes 5 and 6, *supra* at 3. This includes the obligation to provide certain "related services," such as transportation, "to assist a child with a disability to benefit from special education." *See* Special Ed. Regs. at § 300.34 *("[r]elated services* means transportation . . .").[7]

Here, the Student proved that he had a condition which, in the words of one of his physicians, put him "at high risk for stumbling and falling," which was "worse when it is cold outside," and which required that he "be provided with a bus stop that is close to his home." *See* § II (11), *supra*, at 4 and Petitioner's Exhibit 6. For present purposes it will be assumed (without deciding) that the Student thus proved that he was "disabled" under the IDEA.[8]

Yet, the Student did not produce any evidence to suggest that there were any "services, programs or activities" available to him at Jenks that were not equally available to him at Slater, nor did he dispute that transportation to Slater was available to him at a bus stop close to his home.

The Student also failed to adequately explain why Jenks was less difficult for him to physically navigate than Slater, and failed to produce any relevant evidence on that essential point but for the inference one might draw from his mother's conclusory testimony suggesting that there were more steps at Slater than Jenks. In addition, the fact that:

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[7] Although Section 504 does not delineate specific types of "related services," transportation is one of the many related services available under this law. *See* 34 CFR 104.33 and 104.34. In addition, it should be noted that Title II of the Americans with Disabilities Act (the "ADA'), 42 U.S.C. § 12132 *et. seq*., as interpreted by *Olmstead v. L.C.*, 527 U.S. 581 (1999), requires that "services, programs, and activities" provided by public entities like Pawtucket be delivered in the most integrated setting appropriate to the needs of persons with disabilities. *See* 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d) (Title II's integration mandate requires that the "services, programs, or activities of a public entity" be provided "in the most integrated setting appropriate to the needs of qualified individuals with disabilities").

[8] An assumption which, it should be noted, does not appear justified in the absence of any evaluation suggesting that the Student "need[ed] special education and related services" by reason of his "health impairment." *See* Special Ed. Regs. at § 300.8.

(a) the Student had been attending regular physical education classes since 2012. *See* § II (3), *supra* at 3 and Respondent's Exhibit 2;

(b) when explaining the rationale for the requested transfer to Jenks in the Transfer Request, the Student's mother made no mention of any specific physical limitations or of any physical obstacles or logistical issues at either school, and merely cited the fact that the Student's brother attended Jenks. *See* § II (6), *supra* at 3 and Respondent's Exhibit 1;

(c) none of the medical reports admitted into evidence made mention of any specific physical limitations or of any physical obstacles or logistical issues present at either school; and

(d) in her testimony, the Student's mother made no mention of any specific physical limitations or of any logistical problem or physical obstacle present at either school, despite the fact that the Student had been attending Jenks for almost four (4) months,

all suggest that the transfer request was made for convenience rather than as a matter of medical necessity.

V. Conclusion

For all the above reasons, the Petitioner's November 13, 2015 appeal to the Commissioner is hereby denied.

For the Commissioner,

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Anthony F. Cottone, Esq.
Hearing Officer

Dated: January 14, 2016

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Ken Wagner, Ph.D.
Commissioner